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No. 75-352

In the Supreme Court of the United States

OCTOBER TERM, 1975

DOMINIC N. DiSILVIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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A jury trial of petitioner commenced in the United States District Court for the Western District of Pennsylvania, on a charge of receipt and possession of radios stolen from an interstate shipment, in violation of 18 U.S.C. 659. After the government had presented its case, petitioner moved to dismiss the indictment on the ground that it failed to state an offense because it did not specify the facility from which the theft had occurred. This motion was granted. The

government appealed, and the court of appeals affirmed the dismissal. A new indictment was returned curing the prior defect, and petitioner again moved to dismiss, this time asserting that the Double Jeopardy Clause bars any further proceedings. The district court denied this motion. Petitioner appealed before trial and the court of appeals affirmed (Pet. App. 21-28; 520 F.2d 247). Petitioner contends that the evidence at the first trial was legally insufficient and that the Double Jeopardy Clause therefore bars his trial on the new indictment.

1. The evidence introduced before the trial was aborted established that on August 23, 1972, the General Electric plant at Lynchburg, Virginia, shipped 100 two-way radios by Associated Transport, a trucking concern, destined for General Electric's freight depot at Monroeville, Pennsylvania. The consignee was the Allegheny Port Authority, which had purchased the radios for use in Pittsburgh city buses. Each radio was individually boxed and bore a serial number. The shipment went to Roanoke, Virginia, where it was transferred to another truck and sent to Monroeville (App. 3-10, 27-29, 35-44).[1] The driver who transported the shipment to Monroeville testified that the freight depot there was his first stop. He unloaded the loose, unbanded cartons there; they were placed on three pallets, which were then transferred by a lift into the depot. The driver testified that he was unable to count the cartons as they were unloaded and that he marked the quantity as "three pallets" on

[1] "App." refers to the Appendix to Appellant's Brief in the court of appeals, which we are lodging with the Clerk.

his driver's sheet. He was then informed that the shipment was twenty cartons short. He stated on cross-examination that there was no doubt in his mind that he delivered the entire shipment. The shortage was corroborated by an employee at the depot (App. 58-69).

Joseph Chepes, petitioner's father-in-law, who testified under a grant of immunity, related that in early May 1973 he drove petitioner to a building in Masontown, a hamlet near Pittsburgh. Petitioner brought several boxes containing radios out of the building and loaded them into the car. He asked Chepes to take them home and see what he could do with them. Chepes took the boxes to a garage and unloaded them with the help of his son (App. 86-93). The son, who also had been granted immunity, corroborated this testimony (App. 120). About ten weeks later, petitioner asked Chepes to find a buyer and suggested a price of $200 each.

Chepes contacted John Larry Wyland, a welder (App. 72-78). Wyland testified that Chepes' son conducted him to the garage and showed him some radios that looked like those in the courtroom. Before accepting any of the radios for further sale, Wyland made inquiry and was referred to Paul Tiberi who, unknown to Wyland, was a manufacturer's representative of General Electric. Wyland took a sample, which he offered to sell to Tiberi for $250. This, he asserted, was a bargain for a radio that appeared to be worth more than $500. Tiberi asked if the radios were "hot" and offered $100, which Wyland refused. With Wy-

land's consent Tiberi removed the radio's tag, the serial number of which proved to be that of one of the missing radios (App. 116-124, 125-131). Tiberi contacted his company and was interviewed by an agent of the Federal Bureau of Investigation (App. 132-134). The agent went to the garage in question, and, with the consent of young Chepes, took possession of six radios; their serial numbers, too, identified them as a part of the missing shipment (App. 107-108).

2. Petitioner concedes that "the granting of a defendant's motion to dismiss a defective indictment does not bar retrial of that defendant" (Pet 12).[2]

[2] This concession is correct. In *Illinois* v. *Somerville,* 410 U.S. 458, the trial court granted a mistrial over the defendant's objection when it became clear that a technical deficiency in the indictment would require reversal if, following conviction, the defendant had appealed. The defendant was reindicted and retried, a procedure, *Somerville* held, that is not barred by the Double Jeopardy Clause. In the instant case a similar technical deficiency in the indictment—a deficiency unrelated to the general issue of guilt or innocence—would have required a reversal and a second trial if the first trial had proceeded to verdict. Moreover, here, unlike the case in *Somerville,* the first trial was ended at the behest of the defendant. *A fortiori,* the Double Jeopardy Clause does not preclude a second trial of petitioner. It is not material that the termination in *Somerville* was called a "mistrial" and the termination here was a "dismissal of the indictment." The terminations were functionally identical, and, as this Court has held (see, *e.g., Serfass* v. *United States,* 420 U.S. 377, 392), such verbal distinctions have no "talismanic quality for purposes of the Double Jeopardy Clause." In light of petitioner's concession and the similarity of this case to *Somerville,* it is unnecessary to defer disposition of this petition pending decision in *United States* v. *Robbins,* 510 F.2d 301 (C.A. 6), petition for a writ of certiorari pending, No. 75-67, which presents a related issue concerning a government appeal of a mid-trial order dismissing an indictment.

He claims only that insufficient evidence was adduced by the government at his first trial, and that, therefore, he cannot be retried. Petitioner's argument could be successful only if (a) under the Double Jeopardy Clause insufficiency of the evidence in the government's case at one trial bars all subsequent proceedings, and (b) the evidence introduced at petitioner's trial was, in fact, insufficient. As the district court held before it dismissed the indictment, and as the court of appeals agreed, the evidence adduced was sufficient. This decision is correct, and it is therefore unnecessary to reach the double jeopardy argument.[3]

[3] Petitioner's double jeopardy argument is not free from doubt. Compare *Bryan* v. *United States,* 338 U.S. 552 (defendant can be retried if he secures a reversal of a conviction on the ground of insufficiency of the evidence), with *United States* v. *Wiley,* 517 F.2d 1212 (C.A.D.C.) (such retrials should be used only when the insufficiency is attributable to causes beyond the control of the prosecution). However, both *Bryan* and *Wiley* involved a second trial that took place after a court of appeals had held the evidence at the first trial to be insufficient. There will be few cases in which, as here, an accused seeks to block an impending trial on the ground that a court should have declared the evidence at the prior (and only) trial, which was aborted before its completion, to be insufficient. The only other case of which we are aware that has presented a similar situation is *United States* v. *Pomponio,* 517 F.2d 460 (C.A. 4), petitions for writs of certiorari pending, Nos. 75-379 and 75-413. In *Pomponio,* which involves a completed first trial, the petitioners claim that the court of appeals was required to reach the insufficiency of the evidence claim; in the instant case the court of appeals reached the claim and decided it adversely to petitioner.

The evidence recounted above established that the radios disappeared while being shipped, interstate, by truck. This was sufficient both to allow the jury to infer that the disappearance was caused by theft, and that the theft took place at a locus mentioned in the statute. The inference is strengthened by the surreptitious manner in which petitioner sought to dispose of the radios through intermediaries who had no expertise in radios, who were not dealers, and who were authorized to sell at a price well below market value. This evidence also established petitioner's guilty knowledge of the stolen character of the merchandise. Additional evidence of guilty knowledge was supplied by petitioner's unsuccessful effort to induce one of these intermediaries to change the story the intermediary told to the Federal Bureau of Investigation (App. 80-83). As the court below held (Pet. App. 23):

> The first trial ended not because of any assessment of the evidence but because the district court ruled as a matter of law that the indictment was defective. We conclude that the evidence introduced at the trial on the original indictment was sufficient to make out a prima facie case under the statute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[4]

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[4] The court of appeals held (Pet. App. 23-24, n. 2a) that it possessed jurisdiction over petitioner's appeal from a pretrial disposition of a motion to dismiss the indictment on double jeopardy grounds. This question has produced a conflict among the circuits. Compare *United States* v. *Lansdown*, 460 F.2d 164 (C.A. 4) (such orders are always appealable), with *United States* v. *Bailey*, 512 F.2d 833 (C.A. 5) (such orders are never appealable). Another possibility, not discussed in these cases, is that mandamus (but not an appeal) is available to challenge a district court's pretrial order under such circumstances. The petition does not present the appealability question because the court of appeals resolved it in petitioner's favor. It is a jurisdictional question, however, and we reserve the right to contest the court of appeals' jurisdiction should the Court grant the petition.

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